Eng Thye Plantations Bhd v Lim Heng Hock & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A–04–13 OF 1998
GOPAL SRI RAM, DENIS ONG AND MOHD NOOR AHMAD JJCA
2 JULY 2001

Civil Procedure *— Appeal — Facts, finding of — Inferences from primary facts — Appellate court not to make findings of fact — Whether appellate court may make inferences from findings of facts*

The respondents breed fish at the mouth of a river called Sungai Kuala Gula. From time to time, they harvest the fish from the river and sell them. The appellant owns an oil palm plantation and operates a palm oil processing factory at a site upriver. On January 1990, the plaintiffs noticed effluent which they described as 'black water' flowing into the area in which they were rearing fish. The effect of the 'black water' upon the fish was disastrous and eventually all the fish died. The respondents were concerned and one of them (PW3) traced the effluent back to a tidal gate on the appellant's property. He then went into the appellant's premises and saw effluent being discharged from the appellant's waste disposal area. Later, the Fisheries Department investigated the incident and found the river water in the area in question was polluted. Two years after the incident, the respondents filed their action in the sessions court. After a trial that lasted several days, the sessions court gave judgment for the appellant. The respondents successfully appealed. The appellant subsequently appealed to the Court of Appeal to reverse the High Court's decision and to restore the verdict of the sessions court. The appellant suggested that the High Court was wrong to have interfered with the findings of fact made by the sessions court. The appellant submitted that the learned intermediate appellate judge purported to make his own findings of fact instead of accepting those made by the sessions court. The appellant also submitted that the intermediate appellate judge disregarded the fact that the eyewitness evidence led by the respondents was contradicted by independent documentary evidence.

Held, dismissing the appeal and affirming the orders by the High Court:

(1) Appellate courts do not make findings of fact. They merely review the findings of primary facts made by a trial court. They may, however, draw their own inferences from the primary facts and if these differ from those drawn by the trial court, they are entitled to see what accounts for the difference (see p 30E–F). A reading of the sessions courts' judgment revealed at least two infirmities. There was no judicial appreciation of the Fisheries Department's specific findings and the sessions court failed to take any or sufficient account of the uncontradicted evidence of one of the respondents who gave evidence as to the source of the effluent that had flowed into the river (see pp 30H, 31B).

(2) The sessions court appeared to have been much impressed by the insignificant fact of the colour of the water which the respondents' witness said was black and photographs showed it as brownish. What it then boiled down to was a question of description in the particular dialect. In the court's view, 'black water' was as good a description as any other simile (see p 31E–G).

[Bahasa Malaysia summary

Responden-responden membela ikan di muara sungai yang dikenali sebagai Sungai Kuala Gula. Dari masa ke semasa, mereka menangkap ikan daripada sungai tersebut dan menjualnya. Perayu memiliki ladang kelapa sawit dan menjalankan kilang pemprosesan minyak kelapa sawit di kawasan hulu sungai. Pada Januari 1990, plaintif-plaintif menyedari terdapat sisa buangan yang mereka gambarkan sebagai 'air hitam' yang mengalir ke dalam kawasan pembelaan ikan tersebut. Kesan daripada 'air hitam' tersebut ke atas ikan-ikan membawa malapetaka dan akhirnya semua ikan tersebut mati. Responden-responden mengambil berat perkara ini dan salah seorang daripada mereka (PW3) telah mengesan sisa buangan tersebut ke pagar pasang surut atas hartanah perayu. Beliau kemudiannya telah memasuki premis perayu dan melihat sisa buangan tersebut dibuangkan daripada kawasan buangan sisa perayu. Berikutan itu, Jabatan Perikanan telah menyiasat kejadian tersebut dan mendapati air sungai di kawasan yang dipersoalkan telah dicemari. Dua tahun selepas kejadian tersebut, responden-responden telah memfailkan tindakan mereka di mahkamah sesyen. Selepas perbicaraan yang berlanjutan selama beberapa hari, mahkamah sesyen telah memberikan penghakiman yang menyebelahi perayu. Responden-responden telah berjaya membuat rayuan. Perayu sekarang membuat rayuan untuk mengekalkan keputusan mahkamah sesyen tersebut. Perayu mencadangkan bahawa Mahkamah Tinggi khilaf untuk campur tangan dengan penemuan fakta yang dibuat oleh mahkamah sesyen. Perayu menghujahkan bahawa hakim rayuan perantaraan yang arif bertujuan untuk membuat penemuan-penemuan beliau sendiri dan bukan hanya menerima penemuan-penemuan yang telah dibuat oleh mahkamah sesyen. Perayu juga menghujahkan bahawa hakim rayuan perantaraan tersebut telah tidak memperdulikan hakikat bahawa keterangan saksi yang dikemukakan oleh responden-responden adalah bertentangan dengan keteranagn dokumentar yang bebas.

Diputuskan, menolak rayuan tersebut dan mengesahkan perintah-perintah oleh Mahkamah Tinggi:

(1) Mahkamah-mahkamah rayuan tidak membuat penemuan-penemuan fakta. Mahkamah-mahkamah tersebut hanya mengkaji semula penemuan-penemuan fakta utama yang dibuat oleh mahkamah perbicaraan. Mahkamah-mahkamah tersebut mungkin boleh, bagaimanapun, tiba kepada inferen sendiri

daripada fakta-fakta utama dan jika ia berbeza daripada apa yang diputuskan oleh mahkamah perbicaraan, mahkamah-mahkamah tersebut berhak untuk melihat sebab-sebab bagi menerangkan perbezaan tersebut (lihat ms 30E–F). Dengan membaca sekali lalu penghakiman mahkamah sesyen telah memperlihatkan sekurang-kurangnya dua kelemahan. Tiada ulasan penghakiman daripada penemuan-penemuan khusus Jabatan Perikanan dan mahkamah sesyen telah gagal untuk mengambil pertimbangan mencukupi tentang keterangan yang tidak disangkal salah seorang daripada responden-responden yang memberikan keterangan berhubung sumber sisa buangan yang telah mengalir ke dalam sungai tersebut (lihat ms 30H, 31B).

(2) Mahkamah sesyen kelihatan amat tertarik dengan fakta yang tidak penting tentang warna air yang saksi responden-responden telah katakan hitam dan gambar-gambar foto yang ditunjukkan sebagai keperang-perangan. Apa yang boleh disimpulkan adalah tentang persoalan gambaran dalam dialek tertentu. Pada pandangan mahkamah, 'air hitam' adalah sebaik mungkin gambaran yang terbaik dengan perumpaan yang lain (lihat ms 31E–G).]

Notes

For cases on finding of facts, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 729–812, 814–819 and 840.

Cases referred to

Caparo Industries plc v Dickman [1990] 2 AC 605 (refd)
Donoghue v Stevenson [1932] AC 562 (refd)
Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 (refd)
Jaswant Singh v Central Electricity Board & Anor [1967] 1 MLJ 272 (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)

Dinesh Bhaskaran (*Augustine Anthony* with him) (*Awtar Ghazali Augustine & Co*) for the appellant.
M Thayalan (*Thayalan & Associates*) for the respondents.

Gopal Sri Ram JCA. (delivering judgment of the court): This case has to do with environmental law. The sessions court found for the defendant. The High Court reversed. This accordingly falls within that class of case in which we scrutinise the decision of the intermediate appellate judge with greater care. For it is only in rare cases that an appellate court should interfere with the primary findings of fact made by the trial court.

The primary facts in the present case are beyond dispute. The plaintiffs breed fish at the mouth of a river called Sungai Kuala Gula. They have been doing this since 1988. From time to time, when the fish are large enough, they are harvested from the river and sold. The plaintiffs therefore rely on the river to sustain their livelihood. The defendant owns an oil palm plantation and operates a palm oil processing factory. The defendant's

operations are carried on at a site upriver. These operations have been going on since 1967.

On 24 January 1990, the plaintiffs noticed effluent flowing into the area in which they were rearing fish. It came from upriver. They described it as 'black water'. The effect of it upon the fish was startling. They started leaping out of the water. Eventually they all died. The plaintiffs were concerned. One of them (PW3) got into a boat and traced the effluent to its source. He found it flowing out of a tidal gate on the defendant's property. He then went onto the defendant's premises and saw effluent being discharged from the defendant's waste disposal area. Later, an investigation of the incident was conducted by the Fisheries Department. It came to the conclusion that the river water in the area in question was grossly polluted. Some two years after the incident, the plaintiffs filed their action in the sessions court. After a trial that lasted several days, the sessions court gave judgment for the defendant. The plaintiffs successfully appealed. The defendant now asks us to reverse the High Court and to restore the verdict of the sessions court.

The main ground for the High Court's intervention was that the trial judge had failed to properly evaluate the evidence. The defendant has criticised the High Court's judgment. In essence there is only one complaint. It is suggested that the High Court was wrong to have interfered with the findings of fact made by the sessions court. Counsel for the defendant relies on the pronouncements made in several leading cases on the point. I find it unnecessary to go through all of them here. Suffice that I refer to the rather well-known passage in the speech of Lord Dunfermline in *Clarke v Edinburgh Tramways* (1919) SC (HL) 35 at p 36 which encapsulates the principle in remarkably succinct language. I have quoted it often enough. Here it is once again:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case, things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question: am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

But like all principles of law there are qualifications to this one as well. It would be an abdication of an appellate court's proper responsibility if it did not intervene and set right decisions of trial courts that are plainly wrong or unjust. I do not think that an exhaustive list of cases in which an appellate court may intervene can be set out. What is to be discerned is the principles upon which an appellate court acts. These are to be found in the joint judgment of my learned brother Shankar JCA and myself in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395. That was also a case of a failure on the part of the trial judge to undertake a judicial appreciation of the evidence. This is what we there said (at p 398):

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

Returning to the present instance, counsel for the defendant makes two points. First, he says that the learned intermediate appellate judge purported to make his own findings of fact instead of accepting those made by the sessions court. Second, he argues that the learned intermediate appellate judge disregarded the fact that the eyewitness evidence led by the plaintiffs was contradicted by independent documentary evidence. I will address each of these complaints.

Taking the first, it is quite true that there are several passages in the learned appellate judge's judgment in which he says he finds certain facts. When I first read the judgment this caused me some concern. For the function of making primary findings of fact is confined exclusively to a trial court. Appellate courts do not make findings of fact. They merely review the findings of primary fact made by a trial court. They may, however, draw their own inferences from the primary facts and if these differ from those drawn by the trial court, they are entitled to see what accounts for the difference. If it is an entirely subjective consideration, such as the impression made by a particular witness over whom the appellate court has had no audio-visual advantage, then it is only proper that the appellate court defer to the views of the trial judge.

However, a closer examination of the judgment of the High Court reveals that the judge when he said he was making certain findings, he was merely drawing inferences from evidence that had been obviously overlooked by the sessions court. I am satisfied that he was not making any findings of primary fact. In this, the learned intermediate appellate judge was entirely correct.

A reading of the sessions court's judgment reveals at least two serious infirmities. There is no judicial appreciation of the Fisheries Department's specific findings. Instead, the sessions court allowed its mind to be clouded by the several theories (none of which were established as a fact) advanced by the defendant about the alternative causes of the destruction of the plaintiffs' fish. If indeed, it was the plaintiffs' own mismanagement of the river water or the fish they reared in it that was the real cause of the harm

A complained of, it is reasonable that this would have surfaced during the two years or so prior to the incident in question. The plaintiffs depended on the river for their livelihood. It was entirely in their interests that the river be kept free of pollution. Any interference with the ecology of the environment would spell disaster for their livelihood. So it is a most unreasonable inference that the plaintiffs were the authors of their own harm. Yet this was
B put forward as part of the defendant's case and it obviously impressed the sessions court which found the plaintiffs' case unproved.

The sessions court also failed to take any or sufficient account of the uncontradicted evidence of one of the plaintiffs, PW 6, who gave evidence as to the source of the effluent that had flowed into the river. Defendant
C counsel's argument was that this was the evidence of an interested witness and was therefore suspect. With respect, there is no rule of evidential assessment that requires the outright rejection of the evidence of an interested witness. An interested witness is entitled to have his evidence assessed as any other witness. No one can fault a trial judge for approaching the evidence of an interested witness with caution. But no more is required
D of a trial judge. He is entitled to act upon the evidence of an interested witness. To completely overlook relevant evidence is a serious misdirection. It warrants appellate interference.

I now take the defendant's second complaint. It has to do with the conflict between PW4's evidence and the photographs taken at the scene.
E According to the plaintiffs' witnesses, it was 'black water' that came flowing into the river mouth. But the photographs do not show any black water. What they do show is water that is brownish in colour. The sessions court appears to have been much impressed by this rather insignificant fact. The defendant does not deny that it discharged effluent into the river. All it says is that the effluent was not harmful to the ecology of the environment and would have
F no adverse effect on the plaintiffs' fish. But events proved otherwise. It is not in doubt that PW3 and PW6 traced the origin of what they described as 'black water' to the defendant's factory. So the point really turns on the plaintiffs' description of the effluent. I can hardly see that it matters. Why would the plaintiffs who took the photographs and produced them at the trial tell an obviously blatant lie about the colour of the water? It was certainly not to their
G purpose. What it then really boils down to is a question of description in the particular dialect. What does one call effluent in the Chinese language? In my view, 'black water' is as good a description as any other simile. Nothing therefore turns upon the so-called contradiction.

Now the law as to environmental protection is not in doubt. So far as it
H is dependent on common law, the relevant principles that deal with the protection of the environment are to be found in the law of nuisance and in the tort of negligence. The plaintiffs in the present instance chose to found their action in negligence. In order to succeed they had to establish that the defendant owed them a duty of care, that the duty was breached and that the breach occasioned harm that was not remote.

I The defendant has not argued against the imposition of a duty of care. Applying the speeches in the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605 and *Henderson v Merrett Syndicates Ltd* [1995]

2 AC 145, I find this case to fall plumb within the Atkinian formula in *Donoghue v Stevenson* [1932] AC 562. It is a case in which a duty of care was owed by the defendant to the plaintiffs. In my judgment people who use the environment in the ordinary course of their business owe a duty of care to other users of the same environment. There are many examples where a duty of care has been imposed upon an environment user. *Jaswant Singh v Central Electricity Board & Anor* [1967] 1 MLJ 272 is one such. That case concerned damage to a plaintiff's animals by reason of the first defendants' failure to remove a telephone wire that had come loose and was resting on the first defendant's electric wires. The first defendant used the environment to construct pylons that carried electricity over land. Gill J, said at p 275:

> In applying to the facts of the present case the principles of the law of negligence which I have discussed, the first question which I have to consider is whether in view of what happened the defendants can be said to have created a situation of peril, however blamelessly, which generated a consequential duty to adopt precautions before it culminated in injury. In other words, were the circumstances in which damage was caused to the plaintiff capable of giving rise to a notional duty of care? It is clear from the evidence that the telephone wire by itself was not a dangerous thing. What made it dangerous was the fact that it was resting on top of an electric wire by reason of which it was capable of becoming live with electricity, thereby causing damage to anyone who came in contact with it. It was the omission on the part of the defendants to remove the telephone wire from the top of the electric wire which created the situation of danger and consequently gave rise to a notional duty of care. The defendants have not sought to deny the existence of such notional duty. In any event, I do not think it can be seriously argued that no reasonable person could foresee some damage arising to someone in all the circumstances of the case.

Here, the defendant was clearly the plaintiffs' neighbour both in terms of physical proximity and consequence of action. The plaintiffs are persons whom the defendant ought to have had in its contemplation when it discharged the effluent in question. It must be taken to have known of the harm that its activity would cause to the plaintiffs' livelihood. It did not act as a reasonable person would have acted in the circumstances. The damage that the plaintiffs suffered was caused by the defendant and was clearly within its reasonable foreseeability. The defendant was therefore clearly guilty of the tort of negligence. The sessions court was obviously wrong in holding for the defendant. The High Court was obviously correct in reversing the trial judge. I am therefore of the view that this appeal should fail.

The appeal is accordingly dismissed. All orders made by the High Court are affirmed. There was an obvious error by the High Court on the question of interest on damages. General damages were claimed. The normal rule is that interest on such damages should run from the date of commencement of proceedings at the rate of 8%pa. The award by the High Court was accordingly varied and interest was awarded to the plaintiffs at the rate of 8% from the date of the summons in the sessions court.

Appeal dismissed and orders by the High Court affirmed.

Reported by Zahid Taib